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TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1701

UNITED STATES OF AMERICA, *Appellant,*

v.

NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC., *et al., Appellees.*

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Appellees[1] respectfully submit that the final judgment of the District Court, reported at 374 F. Supp. 95, is so plainly correct and the issues raised by appellant so insubstantial as not to require plenary review. Accordingly, appellees move, pursuant to Rules 16 (1)(c) and 16(1)(d) of the Rules of this Court, that the judgment be summarily affirmed.

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[1] This motion is filed on behalf of all defendants in the court below, except the National Association of Securities Dealers, which is filing its own motion to affirm, and Walston & Co. Inc., which is in bankruptcy.

QUESTIONS PRESENTED

The Investment Company Act of 1940[2] created a pervasive scheme of Securities and Exchange Commission ("SEC") regulation over the sale and redemption of mutual fund shares. By that Act, Congress expressly substituted a system of mandatory resale price maintenance, coupled with protections against excessive sales charges, in place of unlimited retail price competition in the sale of fund shares. As an integral part of the statutory resale price maintenance system, Congress also expressly authorized the mutual fund industry to employ contractual restrictions on the transferability of fund shares, provided that such restrictions are disclosed to the SEC and do not contravene SEC rules or regulations.

For over thirty years the mutual fund industry has complied with the statute's mandatory resale price maintenance requirements and has imposed contractual restrictions on transferability which have been fully disclosed to, and not prohibited by, the SEC. The entire price maintenance system, including the contractual restrictions, has operated under the daily scrutiny of the SEC and of the industry's congressionally authorized self-regulatory body, the National Association of Securities Dealers, Inc. ("NASD"). The NASD itself has operated under an umbrella of detailed SEC supervision and has supplemented close SEC regulation of the most minute aspects of the sale and redemption of mutual fund shares.

Only recently (1970) Congress concluded an extensive review of this statutory system of resale price maintenance. As a result of this review, Congress

[2] 54 Stat. 789, 15 U.S.C. §§ 80a-1, *et seq.*

amended[3] the Investment Company Act to strengthen protections against excessive sales charges and determined *not* to disturb the resale price maintenance system pending further SEC study on the potential economic impact of a removal of restrictions against competition. During these congressional proceedings and thereafter, proponents of unrestricted price competition in the sale of mutual fund shares—including, most notably, the Antitrust Division of the Justice Department—unsuccessfully urged repeal of the 1940 statutory scheme or, alternatively, administrative action by the SEC to prohibit the industry's competitive restrictions. Having failed to achieve its objective in Congress and at the SEC, the Antitrust Division now seeks to invoke the Sherman Act to do what both Congress and the SEC, after recent exhaustive study, have thus far refused to do.

Against this background, the following questions of law were presented to the District Court:

1. Does Section 22(f) of the Investment Company Act,[4] by expressly sanctioning those transferability restrictions in mutual fund distribution contracts which are fully disclosed to and not disapproved by the SEC, thereby immunize such restrictions from antitrust attack?

2. Does Section 22(d) of the Investment Company Act,[5] by requiring resale price maintenance in the sale of mutual fund shares (under the sanction of

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[3] Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1314.

[4] 15 U.S.C. § 80a-22(f), quoted at page 15, *infra*.

[5] 15 U.S.C. § 80a-22(d), quoted at page 19, *infra*.

criminal penalty), thereby immunize those who obey the statutory command from antitrust attack?

3. Do the Investment Company Act and the Maloney Act,[6] by granting the SEC exclusive jurisdiction to permit or prohibit restrictions on the manner in which mutual fund shares are sold and redeemed, to control the industry self-regulatory activities of the NASD, and to regulate the flow of mutual fund market information to dealers and the public, thereby immunize those who comply with SEC regulation from antitrust attack?

The court below answered each question in the affirmative. The only issue raised by this motion is whether there is any substantial question as to the correctness of the decision of the court below so as to require plenary review by this Court.

STATEMENT OF THE CASE

A. The Historical Background of the Investment Company Act.

Prior to 1940, shares in open-end investment management companies, popularly called "mutual funds," were sold very much as they are sold today. That is, an investment company or "fund" is created, and shares representing proportional ownership of the fund's portfolio of securities and cash are distributed by principal underwriters. Rather than hire their own salesmen, many underwriters enter into distribution contracts with securities dealers, who agree to sell shares in the fund at retail in return for a percentage of the sales commission or "load." The load is a fixed amount added to the net value of the assets underlying the shares to form the public offering price.

[6] 15 U.S.C. § 78o-3.

Two unique characteristics distinguish mutual fund shares from ordinary corporate securities. First, mutual funds are required by the Investment Company Act to redeem their shares at any time at the approximate net asset value.[7] Second, as a corollary to the redemption obligation, the underwriting of most mutual fund shares is continuous and of unlimited duration. Only last term in *United States* v. *Cartwright,* 411 U.S. 546, 547 (1973), this Court acknowledged the uniqueness of mutual fund shares:

> Unquestionably, the unique characteristic of mutual funds is that they are permitted, under the [Investment Company] Act, to market their shares continuously to the public, but are required to be prepared to redeem outstanding shares at any time.

During the 1930's, this process of continuous distribution and redemption was threatened by development of a secondary or so-called "bootleg" market.[8] Dealers without distribution contracts purchased and sold mutual fund shares at prices which differed from those that obtained in the contractual, or primary, distribution-redemption system. By accepting smaller sales commissions, these non-contract dealers were able to undersell the funds' regular contract dealers. Thus, the "bootleg market" fostered price-cutting by the bootleggers and discriminatory or preferential trea-

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[7] 15 U.S.C. § 80a-22(e).

[8] SEC, Investment Trust Study, Pt. Three, Ch. III, H.R. Doc. No. 279, 76th Cong., 1st Sess. 865 (1939); SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 219 (1966) (hereinafter "Public Policy Report").

ment among investors, and it interfered with the orderly process of continuous distribution through contract dealers. Some regular dealers cancelled their contracts rather than compete with the bootleg market.

In the late 1930's, the funds, their underwriters, and contract dealers sought to counter this "bootleg" market which was jeopardizing the primary distribution system. Members of the industry, including at least one appellee here,[9] inserted in their sales agreements provisions requiring dealers to purchase fund shares from the underwriter and sell them to customers at the current public offering price, which included a fixed sales load. The dealers were also required to participate in redemptions of shares at no additional charge to the customer, and they were prohibited from buying and selling shares for their own account.

In 1940, Congress incorporated this industry effort to combat the "bootleg" market as an integral part of the overall regulatory plan of the Investment Company Act. In Section 22(f) thereof, Congress authorized, subject to SEC contravention by specific rule or regulation, the very same kind of contractual restrictions aimed at the "bootleg" market which are complained of in this case. To further alleviate any "bootleg" market impact on the orderly distribution-redemption process and to eliminate discrimination among investors fostered by such a market, Congress enacted Section 22(d), which requires resale price

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[9] See Affidavit of Caleb Loring, Jr., ¶¶ 5-7, and exhibits thereto, filed by appellee Crosby Corporation in the court below in support of its motion to dismiss.

maintenance in *all* public sales of a fund's shares. Unquestionably, the intent and effect of this legislative scheme was to insulate the sale and redemption of each fund's shares from competitive market forces.

B. Post-1940 Operations and Proposals for Change.

Since 1940 the industry has sold and redeemed shares in precisely the manner contemplated by the Act. Virtually all sales of mutual fund shares are made through the primary distribution system at the current public offering price set forth in the prospectus—that is, net asset value plus the prescribed sales commission or "load." Practically all customers wishing to dispose of their shares redeem them with the fund at net asset value and without any service charge.[10] As the Court observed in *United States* v. *Cartwright, supra,* 411 U.S. at 549:

> Private trading in mutual fund shares is virtually non-existent. Thus, at any given time, under the statutory scheme created by the Investment Company Act, shares of any open-end mutual fund

[10] The distribution-redemption process was described in *United States* v. *Cartwright, supra,* 411 U.S. at 547-48:

> The redemption price ("bid" price) that a shareholder may receive is set by the Act at approximately the fractional value per share of the fund's net assets at the time of redemption. § 80a-2(a)(32). In contrast, the "asked" price, or the price at which the fund initially offers its shares to the public, includes not only the net asset value per share at the time of sale, but also a fixed sales charge or "sales load" assessed by the fund's principal underwriter who acts as an agent in marketing the fund's shares. § 80a-2(a)(35). Sales loads vary within fixed limits from mutual fund to mutual fund, but all are paid to the funds' underwriters; the charges do not become part of the assets of the fund. [Footnotes omitted.]

> with a sales load are being sold at two distinct prices. Initial purchases by the public are made from the fund, at the "asked" price, which includes the load. But shareholders "sell" their shares back to the fund at the statutorily defined redemption or bid price. [Footnote omitted.]

In short, Section 22 of the 1940 Act has accomplished one of its principal purposes. As a practical matter, there is no longer any secondary or "bootleg" market in mutual fund shares that might compete with and erode the contract system of primary distribution and permit price discrimination among investors. The single viable market is *"the market in mutual fund shares that the* [*Investment Company*] *Act created and regulates." Id.* at 557 (emphasis added).

On several occasions since 1940, the Antitrust Division has sought modification of the comprehensive price maintenance and marketing scheme created by Congress. First, the Division urged direct repeal of Section 22(d).[11] Then, the Division requested an indirect repeal of Section 22(d) through SEC exercise of its general exemptive authority under Section 6(c) of the Act[12] and its rule-making authority under Section 22(f).[13] Throughout this time, the SEC and

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[11] See Hearings on H.R. 9510 Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 90th Cong., 1st Sess. 20-2 (1967) (hereinafter "1967 House Hearings"); Hearings on H.R. 11995 Before the Subcomm. on Commerce & Finance of the House Committee on Interstate & Foreign Commerce, 91st Cong., 1st Sess. 135-36 (1969) (hereinafter "1969 House Hearings").

[12] 15 U.S.C. § 80a-6(c).

[13] See Comments of the U.S. Dept. of Justice, Hearings on Mutual Fund Distribution and the Potential Impact of the Repeal of Section 22(d), S.E.C. File No. 4-164, at 2-3, 14, 23-27 (1973); Transcript of Testimony, *id.* at 2084-086, 2089-090 (1973) (Messrs. Hunter and Grossman).

the Congress have been focusing on the very policy questions now raised by this litigation.[14] Congress has repeatedly refused to rewrite the balance struck in 1940. Indeed, in 1970 Congress reaffirmed its 1940 commitment to price maintenance, granted the NASD additional quasi-governmental, self-regulatory authority over the sale and pricing of fund shares, and requested the SEC to determine what would be the economic impact of a repeal of resale price maintenance if Congress ever were to adopt that course.

C. The Context and Commencement of This Litigation.

On November 2, 1972, the SEC announced that a preliminary staff study on the desirability and potential impact of terminating resale price maintenance in the sale of mutual fund shares had been completed.[15] Public hearings were also announced by the SEC on that question and other closely related mutual fund distribution issues.

On February 2, 1973, the Antitrust Division filed a lengthy written commentary in the SEC's Mutual Fund Distribution Hearings, File No. 4-164. While urging the legislative repeal of resale price maintenance under

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[14] See, *e.g.*, 1967 and 1969 House Hearings, *supra;* Hearings on S.1659 Before the Senate Comm. on Banking & Currency, 90th Cong., 1st Sess. (1967) (hereinafter "1967 Senate Hearings"); Hearings on S.34 & S.296 Before the Senate Comm. on Banking & Currency, 91st Cong., 1st Sess. (1969) (hereinafter "1969 Senate Hearings"); SEC, Special Study of Securities Markets, H.R. Doc. No. 95, Pt. 4, 88th Cong., 1st Sess. (1963); SEC, Public Policy Report, *supra* (1966); SEC, Staff Report on the Potential Economic Impact of a Repeal of Section 22(d) of the Investment Company Act of 1940 (1972).

[15] Investment Co. Act Release No. 7475 (F. Sec. L. Rep. '72-'73 Dec. ¶ 79,076 (1972). Shortly thereafter (Nov. 10, 1972), the SEC publicly released its staff study on the potential economic impact of a repeal of Section 22(d).

Section 22(d), the Division said, "Furthermore, we believe that the Commission has the power under § 6(c) of the Investment Company Act to eliminate the adverse effects of the resale price maintenance provisions of § 22(d) and need not wait for repeal. We urge the Commission to use this power." (Comments, pp. 2-3). The Antitrust Division also dealt with the suggestion that, even if Section 22(d) were repealed, the funds would be able to forestall a secondary price-competitive market by restrictions on dealers' rights to redeem shares. The Division dismissed this problem by observing, "However, the Commission could eliminate such difficulties, if they arise, by promulgating regulations prohibiting unreasonable restrictions on transferability pursuant to § 22(f) of the Investment Company Act." (Comments, pp. 13-14). In short, immediately prior to the lawsuit, the Antitrust Division publicly recognized that resale price maintenance for mutual fund shares was mandated by Section 22(d) and that, even absent legislative action, the SEC had adequate statutory authority to deal with restraints on competition in the distribution of mutual fund shares.

On February 21, 1973, the Antitrust Division, despite its written presentation in the SEC hearings less than three weeks earlier, filed this civil antitrust suit, [16]

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[16] Subsequent to the appellant's suit, more than 40 private, treble-damage class actions based on similar allegations were commenced in various federal district courts and transferred to the District of Columbia by the Judicial Panel on Multidistrict Litigation. One class action had been filed in the District of Columbia in December 1972, largely anticipating the theories advanced in the appellant's case. That and one other case were dismissed by the District Court at the same time that it dismissed the appellant's complaint herein. Appeals of those two cases to the U.S.

alleging that long-existing contractual restrictions concerning the manner in which mutual funds are sold and redeemed violate Section 1 of the Sherman Act, 15 U.S.C. § 1. Counts II through VIII attacked alleged restrictions on the sale of mutual fund shares, as set forth in the fund-underwriter and underwriter-dealer agreements publicly filed in the funds' registration statements at the SEC. Count I challenged the legality of various NASD rules and regulations, alleging a horizontal conspiracy of the NASD and its members to stifle the development of a secondary "brokerage market" or secondary dealer market outside the statutorily price-fixed primary distribution system.

The District Court determined that it would first examine the basic, legal question whether the Investment Company Act exempted the alleged conduct from antitrust attack. At oral argument on defendants' motion to dismiss, the Antitrust Division abandoned its attack on the NASD's rules.[17] Thereafter, the General Counsel of the SEC advised the court of the Commission's grave concern that the suit might involve an attack on the rules of the NASD "over which the Commission is granted exclusive original jurisdiction by Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3, et seq. (the Maloney

Court of Appeals for the District of Columbia Circuit were stayed pending resolution of this appeal. The plaintiffs in one of those cases have just petitioned this Court for a writ of certiorari before judgment in the court of appeals, purportedly pursuant to this Court's Rule 20. *Gross* v. *National Ass'n of Securities Dealers, Inc., et al.*, No. 73-1968. The remaining private actions have been stayed by the District Court pending the three appeals.

[17] Transcript of oral argument at 43, 57, 60, 75-6, 83-4.

Act)."[18] Prior to the District Court's decision, the Antitrust Division confirmed its abandonment of those portions of Count I of its complaint which attacked NASD rules.[19]

D. The Decision Below.

On December 14, 1973, the District Court entered final judgment granting the appellees' motion to dismiss the appellant's complaint on the three grounds identified earlier (pages 3-4, *supra*). First, as regards the question of resale price maintenance, the court concluded "that competition in the sale of a single fund's shares is effectively precluded by the 1940 Act which was intended, via § 22(d), to prevent the sale of fund shares at a price less than that fixed in the current prospectus." 374 F. Supp. at 108; App. A55.[20] Second, as regards the challenged restrictions on transferability in the distribution agreements, the court concluded that "by § 22(f) Congress specifically empowered mutual funds to restrict the transferability and negotiability of their shares, subject, of course, to disclosure in registration statements and to the rule-making authority of the SEC." *Id.* at 109; App. A57. The court further found "that Congress designed §§ 22(d) and 22(f) to create and protect a primary

[18] Letter from Lawrence E. Nerheim, General Counsel of the SEC, to the Honorable Howard F. Corcoran, District Judge, August 9, 1973.

[19] Letter from Bruce B. Wilson, Acting Assistant Attorney General, to the Honorable Howard F. Corcoran, District Judge. A similar concession is made in the Jurisdictional Statement (p. 26).

[20] "App. A —" refers to the reprinted opinion in the Jurisdictional Statement.

distribution system which is repugnant to the anti-trust laws and did so in complete recognition of the fact that the legislation would frustrate the growth of a free secondary market." *Id.*; App. A58. Finally, as regards the pervasive regulatory authority of the SEC over the practices raised in the complaint, the court concluded:

> The Investment Company Act and the Maloney Act read together demonstrate that Congress intended to eliminate free competition in the distribution of mutual fund shares. The language of both acts clearly defines the pervasive statutory and administrative control over the area and manifests a congressional intent to leave this complex field to the supervision and control of an expert administrative agency. The SEC and the NASD have the statutory authority to control the area and both have in fact taken an active role. [*Id.* at 111-12; App. A62-63; footnote omitted.]

As demonstrated in the following argument, the Jurisdictional Statement raises no substantial question as to the correctness of these determinations.[21]

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[21] Despite the suggestion in the Jurisdictional Statement (p. 3) that this case involves a claimed exemption for "all possible restraints in the distribution and sale of mutual fund shares", the issues are much narrower. The complaint did not allege the existence of horizontal restrictions upon *inter*-brand competition, and no defendant below suggested that any such horizontal restriction would be exempt from antitrust challenge. This appeal involves only alleged *intra*-brand restrictions on the sale and redemption of a fund's own shares. Vigorous and unfettered inter-brand price competition has always existed among the load funds themselves; between high, low, and no-load funds; and between open-end funds, closed-end funds, and other investment media.

ARGUMENT

The Court should summarily affirm the judgment below as embodied in the carefully documented opinion of the District Court. The pendency of this appeal should not be protracted, for it detracts from the on-going regulatory activity of the SEC, the agency properly found to have jurisdiction over the challenged practices.[22]

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[22] The Honorable Ray Garrett, Jr., the Chairman of the SEC, in a public address of May 15, 1974, on "Mutual Funds: Fifty Years and Beyond," pointedly observed:

> You are aware of the fact that the Antitrust Division of the Department of Justice has challenged the present practice of most funds in this regard [price competition] on antitrust grounds, and the Solicitor General, it was recently reported, has agreed to prosecute an appeal of an adverse decision of the United States District Court in *United States* v. *NASD*. *We did not think the Antitrust Division should have proceeded on this ground under the antitrust laws, because we think the problem should be resolved as a regulatory matter under the Investment Company Act*. They have not seen fit to comport with our general views, and we may, in the end, have a definitive court determination that will bind all of us, whatever we might otherwise have done.
>
> In the meantime, our staff is still analyzing the information and arguments provided at the hearings on mutual fund distribution and trying to fashion a proposal. I understand that the staff's proposal is likely to be some middle ground between retention of all of the present practices intact, on the one hand, and the virtual repeal of Section 22(d) on the other. Without expressing any views of my own, I think this is an interesting area to explore and we look forward to receiving the staff's proposals shortly. [Emphasis added; footnote omitted.]

I. Section 22(f) Authorizes Restrictions on Transferability and Negotiability of Mutual Fund Shares That Are Disclosed to the SEC and Not in Contravention of SEC Rules and Regulations, Even Though They May Inhibit a Secondary Market for Those Shares.

The complaint alleges that the appellees confined trading in mutual fund shares to the primary distribution-redemption system for such shares by inhibiting secondary market activity and restricting contract dealers from freely transferring fund shares. It is evident, however, from the language and history of Section 22(f) of the 1940 Act, 15 U.S.C. § 80a-22(f), that Congress explicitly authorized fund share transferability restrictions which inhibit the development of a secondary market, so long as such restrictions are disclosed in the funds' registration statements and do not contravene existing SEC rules. Section 22(f) provides:

> No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statements nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company.

Appellant concedes that Section 22(f) was concerned with the "bootleg market." Jur. St. 22. Appellant contends, however, that the Section was intended to restrict, rather than assist, the industry in its efforts to eliminate a secondary market. *Id.* 22 n.24. The language and history of Section 22(f) thoroughly discredit the appellant's view.

When the bill which became the 1940 Act was under consideration, Congress was confronted with the practices of noncontract dealers operating in the "bootleg" secondary market and competing in price against the primary market distributors. Underwriters and contract dealers had been endeavoring to counteract the deleterious effects of the bootleg market by imposing contractual restrictions on negotiability and transferability of mutual fund shares.[23] While recognizing the significance of the restrictions in meeting the problems of the bootleg market, the SEC noted that the restrictions might eliminate "a big portion of the owner's right of initiative."[24]

The forerunner of present Section 22(f) was Section 22(d)(2) of the original SEC-sponsored bill (S. 3580, 76th Cong.), which authorized the SEC to "prohibit" by rules and regulations "restrictions upon the transferability and negotiability" of fund shares. Testifying in favor of Section 22(d)(2), the SEC's Chief Counsel, David Schenker, described existing limitations on transferability as "restriction[s] on alienability." He urged that such serious inhibitions "ought to be a matter of rules and regulations."[25] Thus, original Section 22(d)(2) was directly concerned with the sec-

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[23] See SEC, Investment Trust Study, Pt. Three, Ch. III, H.R. Doc. No. 279, 76th Cong., 1st Sess. 865 (1939); SEC, Public Policy Report, *supra*, 219 (1966).

[24] Hearings on S. 3580 Before a Subcommittee of the Senate Comm. on Banking & Currency, 76th Cong., 3d Sess 292 (1940), where the SEC's spokesman discussed the predecessor of Section 22(f), originally numbered § 22(d)(2), and its coverage of restrictions on transferability, saying: "It presents a whole problem which they call the bootleg market." *Id.*

[25] *Id.* 293.

ondary market and drafted against the background of existing private transferability restrictions which had been devised so as to restrict, if not to eliminate, that market.

In Section 22(f), as finally enacted, Congress accepted SEC regulation of these restrictions, but with one important modification. Instead of merely granting the SEC power to prohibit these restrictions, as provided in the original bill, Congress affirmed the funds' right to restrict share transferability so long as the restrictions are disclosed in the funds' registration statements and do not contravene SEC rules or regulations. The funds' power under Section 22(f) is complete and is not limited to primary distribution activities. It extends to all transfers of fund shares, whether effected in "dealer" or "broker" transactions.

The SEC has consistently administered the 1940 Act in accordance with this construction of Section 22(f). The SEC has been reminded repeatedly of the restrictive uniform sales agreements through successive filings since 1941 of the funds' registration statements, into which the sales agreements have been incorporated as exhibits in compliance with SEC-prescribed forms.[26] The SEC has issued no rules or regulations to prohibit the restrictions in those agreements. The SEC staff has discussed the restrictions' adverse effect upon the secondary market[27] and has noted that "[o]ften the contract requires him [the dealer] to place all orders with the principal underwriter and to refrain from any

[26] 1 F. Sec. L. Rep. ¶ 7177 Item 1 (Form S-5); 3 F. Sec. L. Rep. ¶ 51,296 Item 6 (Form N-8B-1).

[27] SEC, Special Study of Securities Markets, H.R. Doc. No. 95, Pt. 4, 88th Cong., 1st Sess. 98 (1963).

attempt to obtain shares from other sources,"[28] which is just the sort of restriction attacked in the case at bar. The SEC Commissioners themselves have focused upon the meaning and legality of the restrictions on fund share transferability. Indeed, in one instance Commissioner Loomis, a former SEC General Counsel, referred to the "perfectly lawful requirement in the dealer agreements that applicant act as a dealer," and expressed his view that there was nothing "unlawful" about this "generally accepted form of dealer agreement."[29]

Because the SEC, which was designated by Congress as the sole judge of the propriety of these restrictions, has been continuously aware of them, and because the congressional requisites for their validity have been met, there is no warrant for another governmental agency to encroach upon the SEC's judgment by applying the prohibitions of the Sherman Act to these restrictions.

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[28] SEC, Staff Report on the Potential Economic Impact of a Repeal of Section 22(d) of the Investment Company Act of 1940, Pt. I, 24 (1972) in F. Sec. L. Rep. Report No. 450, Pt. II at A-109.

[29] *Mutual Funds Advisory, Inc.*, Inv. Co. Act Rel. No. 6932 at 7 (1972) (Commissioner Loomis, dissenting on other grounds); see also *First Multifund of America, Inc.*, F. Sec. L. Rep. '70-'71 Dec. ¶ 78,209 at p. 80,602 (1971).

II. The Mandatory Price-Fixing Provisions in Section 22(d) Were Intended To Protect the Primary Distribution System and To Prevent Price Discrimination Among Investors Which Would Result from a Secondary Market.

A close companion to Section 22(f) is Section 22(d) of the 1940 Act, which requires resale price maintenance for fund shares. It provides in pertinent part:

> No registered investment company shall sell any redeemable security issued by it to any person except either to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at the current public offering price described in the prospectus. * * * *

Like Section 22(f), Section 22(d) was a response to the "bootleg" secondary market which the SEC had described to Congress in these terms:

> The so-called "bootleg market" was the market made by dealers who traded in the shares of open-end investment companies without the authority of the principal distributors for those companies. These dealers would often offer a little more than the published redemption price and ask a little less than the published sale price. In an active market, the unauthorized dealer could still get a greater spread than the authorized dealer. A certain amount of protection was received by such operators through their ability to obtain shares from the legitimate distributors if these dealers were short. Such operations actually had the effect of initiating a small scale price war between retailers and tended generally to disrupt the established offering

> price. Certain open-end investment companies attempted to overcome this by restricting the negotiability of their shares, providing substantially that the shares could only be sold or tendered for redemption to the open-end investment company. [SEC, Investment Trust Study, Pt. Three, Ch. III, H.R. Doc. No. 279, 76th Cong., 1st Sess. 865 (1939) (footnotes omitted).]

During the initial 1940 Senate hearings on the Investment Company Bill, the mutual fund industry expressed dissatisfaction with various features of the measure. Apparently as one means of solving its bootleg market problem, the industry proposed an amendment to Section 22 of the bill to provide that "no securities issued by an investment company *shall be sold* to insiders or *to anyone* other than an underwriter and dealer except on the same terms as are offered to other investors."[30] At congressional urging, the industry and the SEC worked out a compromise bill (S. 4108) which included the industry's across-the-board price-fixing proposal, now section 22(d).[31] The House version of the revised bill, with amendments not material here, was enacted.[32]

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[30] See Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking & Currency, 76th Cong., 3rd Sess. 1057 (1940) (remarks of Mr. Bunker) (emphasis added) (hereinafter "1940 Senate Hearings").

[31] See Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate & Foreign Commerce, 76th Cong., 3rd Sess. 63 (Statement of SEC Chairman Healy), 71-3 (statement of Mr. Bunker) (1940) (hereinafter "1940 House Hearings"); 86 Cong. Rec. 10069-10071 (Aug. 8, 1940) remarks of Sen. Wagner and Sen. Taft).

[32] The House reported out H.R. 10065, which differed in only minor respects from S. 4108 passed by the Senate. H.R. Rep. No. 2639, 76th Cong., 3rd Sess. (1940). The Senate agreed to the House

Thus, in approving Section 22(d), Congress responded to the urging of the mutual fund industry to protect its primary distribution system from the cut-price competition of a secondary market and to protect investors from the discrimination fostered by such a market.

In 1967, while reviewing the origin of Section 22(d) in this context of "bootleg" market price-cutting, the SEC advised Congress:

> Section 22(d) * * * has undoubtedly done much to shape the mutual fund industry into its present form.
>
> * * *
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> Such competition as existed in the pre-1940 period seems to have had a truly disruptive effect on the relations between principal underwriters and contract dealers * * *. [1967 House Hearings, *supra,* 59.]

The specific purposes of Section 22(d) have been described by the SEC and other authorities as follows:

> (1) to insure the orderly distribution of open-end investment company shares, (2) to prevent discrimination or preferential treatment in price among members of the public, and (3) to prevent the cut-price competition which had then [prior to the 1940 Act] been making serious inroads upon the contractual distribution system of the mutual fund underwriting firms.[33]

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version. 86 Cong. Rec. 10069-10071 (Aug. 8, 1940). In the short House hearings preceding passage, one critic of the original proposal lauded the revised bill for establishing, *inter alia,* "a method of standardizing selling practices." See 1940 House Hearings, *supra,* 78 (remarks of Mr. Traylor).

[33] Greene, "The Uniform Offering Price of Mutual Fund Shares Under the Investment Company Act of 1940," 37 U. Det. L. J. 369, 371 (1960); see *Baum* v. *Investors Diversified Services, Inc.,*

To achieve these objectives, Section 22(d) imposes a scheme of mandatory resale price maintenance without any of the voluntary features typically found in state fair trade laws. Under its strict terms, Section 22(d) does not allow a fund to open its shares to competitive intra-brand pricing. Similarly, contract underwriters and contract dealers, whatever their views on the merits of competition, are forbidden from selling a fund's shares to the public except at the fixed prospectus price for those shares. To prevent the development of an over-the-counter "bootleg" market offering shares to the public at less than the fixed price charged by a fund's regular distributors, Section 22(d) also prohibits non-contract or "street" dealers from selling except at the public offering price fixed in the fund's prospectus.[34] The only exception to the foregoing prohibition is that the fund, underwriter, and dealers may sell *inter sese* at less than the price fixed for sales to investors. Price-cutting in violation of Section 22(d) is a federal crime punishable by sub-

286 F. Supp. 914, 921-22 (N.D. Ill. 1968), aff'd, 409 F.2d 72 (7th Cir. 1969); SEC, Special Study of Securities Markets, *supra*, 98 n. 12; Simpson & Hodes, "The Continuing Controversy Surrounding the Uniform Price Maintenance Provisions of the Investment Company Act of 1940," 44 Notre Dame Lawyer 718, 719 (1969).

[34] SEC, Public Policy Report, *supra*, 220. If Section 22(d) were intended to prevent nothing more than riskless trading and dilution by fund *insiders* (as the appellant contends, Jur. St. 18), the provision would not have broadly covered *outsiders* such as "bootleg" dealers. This coverage of outsiders was intentional. When the industry proposed Section 22(d), it indicated that the language would apply to all sales "to insiders *or to anyone.*" See page 20, *supra*, (emphasis added).

stantial criminal penalties, as well as severe SEC and NASD disciplinary measures.[35]

Very recently (1967-70), Congress comprehensively reviewed nearly thirty years of industry operation under Section 22(d)—a crucial fact which the Jurisdictional Statement largely ignores. The Chairman of the SEC testified that Section 22(d) "is unequivocal":

> No person, no matter where he gets it, from the issuer, from another dealer, or even from a private person, no broker-dealer may sell a share of a particular fund at a price less than that fixed by the issuer. [1967 House Hearings, *supra*, 711.]

The Senate Committee on Banking and Currency twice reported:[36]

> Under this Section [22(d)], all dealers, regardless of the source of the shares they sell, are prohibited by law from cutting the sales charge fixed by the mutual fund underwriter. Price cutting in this field is a Federal crime.

Rather than repeal or amend Section 22(d) so as to permit competitive and discriminatory pricing in sales to investors—as the Antitrust Division, but not the SEC, had urged—the 91st Congress decided that fixed

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[35] See 15 U.S.C. § 80a-49; 15 U.S.C. §§ 78o-3(b)(5)(D), (b)(5)(E), & (b)(7); SEC, Public Policy Report, *supra*, 220-21; Hearings on S.1659 Before the Senate Comm. on Banking & Currency, 90th Cong., 1st Sess. 86 (1967) (SEC Chmn. Cohen); 1967 House Hearings, *supra*, 48, 140 (SEC Chmn. Cohen); *e.g.*, *In re Bakos*, F. Sec. L. Rep. '72-'73 Dec. ¶ 79,095 (1972); *In re Sideris*, Exch. Act Rel. No. 8816 (1970).

[36] S. Rep. No. 91-184, 91st Cong., 1st Sess., 3 U.S. Code Cong. & Adm. News 4897, 4904 (1969); S. Rep. No. 1331, 90th Cong., 2d Sess. 7 (1968).

sales loads should "continue to be protected against price competition by Section 22(d) * * *."[37] In the Investment Company Amendments Act of 1970, Congress chose to address the question of high sales loads by giving the industry further self-regulatory power, subject to SEC review. The 1970 amendments authorized the NASD to issue rules barring "excessive" sales loads, granted the NASD an antitrust exemption which would, among other things, permit NASD members to engage in a limited form of horizontal, inter-brand price-fixing by rule-making, and prescribed that the NASD's rules should "allow for reasonable compensation for sales personnel, broker-dealers, and underwriters * * *." Section 22(b), as amended, 15 U.S.C. § 80a-22(b). Under the statutory scheme, resale prices fixed pursuant to this rule-making authority would necessarily, by reason of Section 22(d), become applicable to sales by non-contract, non-member dealers as well.

The appellant contends, however, that Section 22(d) has contained from its inception a major loophole for cut-price "transactions in outstanding shares that investors sell to other investors through a broker." [Jur. St. 14]. According to the appellant, the appellees have been in open violation of the antitrust laws since 1940, because they continued to use and to file with the SEC uniform sales agreements which prevented dealers from executing sales, in any capacity, except at the public offering price. After more than thirty years, the appellant now insists that, although dealers are subject to criminal penalties if they sell to an investor under

[37] S. Rep. No. 91-184, *supra*, 3 U.S. Code Cong. & Adm. News 4912; H.R. Rep. No. 91-1382, 91st Cong., 2d Sess. 30 (1970).

the public offering price, they nevertheless must undertake the "brokering" of sales between investors at less than that price. In the appellant's view, an agreement not to undercut the distribution price and thereby risk a violation of Section 22(d) becomes in itself a violation of the antitrust laws.

A careful reading of the statute and its history does not support the appellant's view. For example, the omission of the word "broker" from Section 22(d) hardly "reflects a deliberate intent to exclude brokerage transactions from the price-maintenance restrictions on sales to investors contained in that section [Jur. St. 15]." If there actually had been a "brokerage" market in fund shares prior to 1940, perhaps Section 22(d) would have addressed that possibility more precisely. In practice, the pre-1940 "bootleg market" dealings of street traders and defecting contract distributors, as well as the regular dealings of contract distributors, were undertaken in a "principal" capacity on the selling side, with an "agent" sometimes representing the buying investor.[38] Today, irrespective of the terms of the uniform sales agreements, Section 22(d) effectively bars price-cutting in all such markets. Pure "brokered matches" between investors were simply never mentioned in the SEC's pre-Act literature. Yet, the sweep of Section 22(d) is certainly broad enough to require price maintenance if a dealer were to participate in such a transaction. As stated in the 1940 Senate report, the purpose of Section 22(d) was "to prohibit *the sale* of redeemable securities *to any person* other than a dealer or principal underwriter at a price less than * * * " the

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[38] SEC, Investment Trust Study, Pt. Two, Ch. IV, H.R. Doc. No. 70, 76th Cong., 1st Sess., 324-28 (1939).

public offering price. S. Rep. No. 1775, 76th Cong., 2d Sess. 16 (1940) (emphasis added).

Section 22(d) does not employ the term "dealer" in a transactional capacity sense, as the appellant contends.[39] Nor does the provision permit one to totally ignore, as appellant does, the controlling effect of the word "sell," another of Section 22(d)'s statutorily defined terms.[40] Furthermore, as the District Court pointed out, the appellant's narrow argument "ignores the price maintenance purpose of Section 22(d) and its

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[39] Elsewhere in the 1940 Act, Congress used capacity-oriented language when it intended obligations to turn on a particular transactional capacity. See Sections 2(a)(8), 2(a)(17), 2(a)(29), 17(a), 17(d), 17(e)(1), 15 U.S.C. §§ 80a-2(a)(8), -2(a)(17), -2(a)(29), -17(a), -17(d), -17(e)(1). But in Section 22(d), the price maintenance obligation is operative against any person, regardless of capacity, who fits the statutory definition of "dealer," i.e., "any person regularly engaged in the business of buying and selling securities for his own account * * *" Section 2(a)(11), 15 U.S.C. § 80a-2(a)(11). There is no question that each appellee dealer here regularly buys and sells mutual fund shares in its business as contract dealer.

[40] Section 2(a)(34) defines "sell" to cover *all efforts* to effect a sale, not simply completed transactions. It includes "every contract of sale, or disposition of, *attempt or offer to dispose of*, or *solicitation of an offer to buy*, a security or interest in a security for value." (Emphasis added.) So great is the appellant's propensity to read the words "dealer transaction" into Section 22(d), that its complaint (¶¶ 13-14) declines to quote the statute directly but paraphrases it as if it included that phrase and expressly excluded "brokerage transactions." However, the appellant's fixation with the term "transaction," which does not even appear in Section 22(d), should not obscure the fact that a dealer may not even engage in an "attempt or offer to dispose of" or a "solicitation of an offer to buy" fund shares without coming under the strictures of Section 22(d).

corollary that there must not be price discrimination between similarly situated investors." 374 F. Supp. at 104; App. A47. It would be wholly inconsistent with the purposes of Section 22(d) to permit a secondary distribution network, ostensibly based on "brokerage transactions," to compete with the primary distribution system. Congress' objective of insulating the primary system from price competition emanating from outside that system is best illustrated in Section 22(d)'s prohibition against cut-price sales to investors by non-contract dealers.[41] It would be strange indeed if Congress meant to bar price competition from the one historically likely source, but not from the dealer members of the underwriting syndicate itself.

Price competition from "brokered" shares would plainly contravene one of the purposes of Section 22(d) frequently announced and enforced by the SEC—prevention of competitive inroads on the regular distribution system.[42] Appellant's argument to the contrary, based as it is on an inapposite analogy to "second-hand markets" for ordinary commodities (Jur. St. 14), is not persuasive. A mutual fund share presently in an investor's or a putative "broker's" hands is no different in intrinsic worth or in any other characteristic from a

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[41] The appellant plainly errs in contending (Jur. St. 15 n.13) that "all of [Section 22's] subsections concern transactions in or from the primary distribution chain of fund-underwriter-contract dealer-investor." Section 22(d) plainly forbids dealers outside that chain from selling shares to investors at less than the public offering price fixed for dealers in the chain. See page 22, *supra.*

[42] See, e.g., *Adoption of Rule N-22D-1,* F. Sec. L. Rep. '57-'61 Dec. ¶ 76,625 at p. 80,393 (1958); *In re Sideris, supra,* p. 2; *Investors Diversified Services, Inc.,* F. Sec. L. Rep. '57-'61 Dec. ¶ 76,699 at p. 80,620 (1960).

share undergoing primary distribution. Each can be redeemed for net asset value; shares are completely fungible.[43] Accordingly, "brokering" at less than the public offering price would be contrary to Section 22(d) because it would constitute an inroad on the primary market.

Furthermore, under appellant's view of the law, the lucky and/or sophisticated investor would receive a preferential price made possible by a fortuitous "match" with another investor (necessarily accomplished with no "sales effort" by intermediary agents)[44] while everyone else pays the fixed offering price. As was pointed out by the court below (374 F. Supp. at 105; App. A47-8), that would be contrary to the anti-discrimination purpose which the SEC has repeatedly recognized as a principal concern of Section 22(d). In adopting Rule 22d-1, 17 C.F.R. § 270.22d-1, the Commission said in 1958:[45]

> [T]he purposes of the section [22(d)] are to *prevent discrimination among purchasers* and to pro-

[43] Nor is it fair to compare, in terms of the potential impact of price competition from secondary markets, the continuous distribution and redemption of open-end fund shares with the limited-term primary distribution process for other securities. Unlike the latter, the regular fund distribution-redemption process cannot be considered "initial" (Jur. St. 6, 10, 11), as if it were expected to terminate shortly. The appellee funds have engaged in continuous distribution and redemption since before the 1940 Act, have announced no intention to close up their distribution process in the future, and are required by the Act to continue to accept redemption requests.

[44] See page 26, note 40, *supra*.

[45] *Adoption of Rule N-22D-1, supra,* at p. 80,393 (emphasis added); see also Inv. Co. Act Rel. No. 89 (1941); SEC, Staff Report on Potential Impact of Repeal of Section 22(d) at 294 (1972).

> vide for orderly distribution of such shares by preventing their sale at a price less than that fixed in the prospectus. [Emphasis added.]

The SEC's concern over discrimination constituted one of the principal reasons for its decision in 1966 to recommend regulation of sales loads rather than the repeal of Section 22(d):

> [R]etail price competition would permit knowledgeable investors to purchase mutual fund shares at sales loads substantially lower than those now prevailing, but others—among them those most in need of protection—might save little or nothing. [SEC, Public Policy Report, *supra,* 222 (1966).]

In enforcement actions, the SEC has also referred to this important anti-discrimination purpose of Section 22(d).[46] Similarly, in weighing applications for exemptions from Section 22(d), the SEC has considered granting exemptions only when it is clear that unlawful discrimination will not result.[47]

The District Court correctly concluded that in the sale of mutual fund shares, price competition from any form of secondary market, including a hypothetical "brokerage" market, is precluded by Section 22(d)'s

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[46] See, *e.g., In re Sideris, supra,* 2.

[47] *E.g., Mutual Funds Advisory, Inc.,* Inv. Co. Act Rel. 6932 at 4 (1972); *Midamerica Mutual Fund, Inc.,* 41 S.E.C. 328, 331 (1963); *Variable Annuity Life Ins. Co.,* F. Sec. L. Rep. '57-'61 Dec. ¶ 76,688 at p. 80,599 (1960).

Regarding the statutory purposes of Section 22(d) explained in these SEC decisions, we agree that "construction by an agency responsible for administering a statute it helped to draft is entitled to the greatest weight (*Zuber* v. *Allen,* 396 U.S. 168, 192) * * * [Jur. St. 19-20]." Moreover, in 1970 Congress relied upon the SEC's interpretation of Section 22(d)'s purposes and reaffirmed those purposes when it rejected repeal of the section, thus according still more weight to the SEC interpretation.

broad purposes and that restrictions on such competition are exempt from the prohibitions of the antitrust laws.

III. THE SEC EXERCISES PERVASIVE REGULATORY AUTHORITY OVER THE CONDUCT IN QUESTION AND, ACCORDINGLY, THAT CONDUCT MAY NOT BE CHALLENGED UNDER THE ANTITRUST LAWS

The decision below is supported not only by Sections 22(f) and 22(d) of the Investment Company Act and their clear rejection of ordinary antitrust prohibitions, but also by an elaborate and all-encompassing matrix of SEC regulation created by that Act and the Maloney Act of 1938, 15 U.S.C. § 78o-3. For good reason, the District Court concluded that this comprehensive regulatory system was obviously designed to displace the antitrust laws with respect to the conduct at issue. The court below acknowledged that it was "not, of course, unmindful" of this Court's view that implied displacement of the antitrust laws should be found only where direct antitrust enforcement is plainly inconsistent with the regulatory scheme. 374 F. Supp. at 113; App. A66. Accordingly, the District Court deliberately confined its holding to a "limited antitrust exemption" in the "narrow area" of conduct encompassed by this case. *Id.* at 114; App. A67. As was said in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385 n.14 (1973), a comprehensive regulatory scheme "may, nonetheless, in particular and discrete instances by implication grant immunity from an antitrust claim." This case is one of those "particular and discrete instances."

The SEC's extensive day-to-day supervision of each investment company's structure, conduct, financial policies, dealings with and by affiliates, periodic re-

ports, and pricing, sales, distribution, and redemption practices is thoroughly documented in the opinion below. 374 F. Supp. at 98-102; App. A34-42. In addition, the 1940 Act clothes the SEC with "authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere" in the Act. 15 U.S.C. § 80a-38(a).

Under Section 6(c) of the 1940 Act, 15 U.S.C. § 80a-6(c), the SEC may conditionally or unconditionally exempt persons, securities, or classes thereof, from any provision in the 1940 Act to the extent such exemption is in the public interest and consistent with investor protection and the purposes of the Act. The exemptive power may be exercised by orders as well as by rules and regulations. It is broader in that respect than the general exemptive power available under the Securities Act of 1933 or the Securities Exchange Act of 1934.[48] Indeed, the Antitrust Division has contended that the SEC might use its Section 6(c) authority to relieve all dealers from the price maintenance obligations of Section 22(d).[49] The SEC has not indicated that such an exemption would accord with the public interest. But if such an exemption ever were validly ordered, it might be accompanied by a rule or regulation under Section 22(f) modifying uniform sales agreement provisions which prevent sales to investors below the public offering price.[50]

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[48] *Baum* v. *Investors Diversified Services, supra,* 286 F. Supp. at 926.

[49] See page 10, *supra.*

[50] The Antitrust Division has argued that the SEC could exercise this Section 22(f) authority. See page 10, *supra.*

In addition, the SEC is empowered under the Maloney Act of 1938 and the Investment Company Act to closely regulate the affairs of the NASD and its members. The NASD is a unique industry self-regulatory association, congressionally authorized by the Maloney Act, 15 U.S.C. § 78o-3, and the Investment Company Act, 15 U.S.C. §§ 80a-22(a) and (b), to exercise quasi-governmental rule-making power over members' ordinary over-the-counter and mutual fund distribution activities. The NASD is registered with and carefully supervised by the SEC. The SEC has the authority to disapprove the NASD's Rules of Fair Practice and any changes thereto before they take effect, to abrogate part or all of any existing rules, and to issue superseding rules when necessary.

The SEC has similar power as to NASD rules issued under Sections 22(a) and 22(b) of the Investment Company Act. 15 U.S.C. § 80a-22(c). Under Section 22(a) the NASD is required to issue rules setting the minimum price at which members may buy shares from the fund, the maximum resale or redemption price for members, and their minimum holding period. Section 22(b)(1), as revised in 1970, empowers the NASD to adopt rules prohibiting members from charging "excessive" sales loads, provided that such rules "allow for reasonable compensation for sales personnel, broker-dealers, and underwriters."[51] Clearly, then, the appellant's real goal in this lawsuit—the lowering of sales loads charged investors—is a subject already entrusted to the exclusive regulatory control of the NASD and the SEC.

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[51] A draft NASD rule regulating sales loads is presently being reviewed, on an informal basis, by the SEC staff. See Inv. Co. Act. Rel. No. 7475, F. Sec. L. Rep. '72-'73 Dec. ¶ 79,076 at p. 82,325 (1972); NASD Rel. No. 11172, F. Sec. L. Rep. '72-'73 Dec. ¶ 79,077 (1972).

Thus, this all-pervasive SEC regulatory control covers the gamut of NASD activities, including those which bear on the restraints alleged here. Not only are the NASD's rules and disciplinary actions subject to SEC approval, abrogation, and supersession, but Congress has twice declared that the antitrust laws are not operative in this area.[52] Moreover, Congress has specifically directed the SEC regarding the extent to which the SEC is to consider competitive factors in its examination of NASD rules,[53] thus making SEC review a substitute for judicial enforcement of antitrust policies.[54] Compare *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 302-03 n. 13 (1973). Where such exclusive agency jurisdiction exists, antitrust immunity is properly implied. *Pan American Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc., supra.*

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[52] Section 15A(n) of the Exchange Act, added by the Maloney Act, 15 U.S.C. § 78o-3(n); Section 22(b)(4), added by the Investment Company Amendments Act of 1970, 15 U.S.C. § 80a-22(b)(4); S. Rep. No. 91-184, *supra,* 3 U.S. Code Cong. & Adm. News 4913; H.R. Rep. No. 91-1382, *supra,* 30.

[53] 15 U.S.C. §§ 78o-3(b)(8) and 80a-22(b)(1).

[54] See *In re NASD,* F. Sec. L. Rep. '72-'73 Dec. ¶ 78,381 at 81,824 (S.E.C. 1972), aff'd without opinion, (D.C. Cir. 1973), F. Sec. L. Rep. Report No. 504 at 5 (Nov. 9, 1973); *In re NASD,* 19 S.E.C. 424, 436, 486-87 (1945); *Rules of the New York Stock Exchange,* 10 S.E.C. 270, 287-88 (1941); *cf. Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 244 (1968). By virtue of the Investment Company Act and the Maloney Act, the SEC obviously has the comprehensive jurisdiction over the regulated parties' practices which was lacking in *City of Lafayette* v. *SEC,* 454 F.2d 941 (D.C. Cir. 1971), cited by the appellant (Jur. St. 25 n.28). Hence, here the SEC's day-to-day balancing of competitive considerations with other aspects of the public interest displaces separate antitrust adjudication.

Similarly, the allegations in paragraph 17 of appellant's complaint, concerning a purported "combination" or "conspiracy" between the NASD and its members, relate to matters fully within the SEC's exclusive regulatory authority; and, therefore, the antitrust laws do not apply. The appellant has already conceded this, in part, by abandoning the key portions of paragraph 17—an attack on the NASD rules (¶¶ 17 (a) & 17(b) and ¶ 6 of the prayer for relief).[55]

The allegation (¶ 17(c)) about inducing restrictive distribution agreements refers to a letter that the NASD sent to its membership in 1959. The letter (Gov't Ex. 18 below) advised that underwriter-dealer agreements might be amended to prevent contract dealers from taking down shares for resale to noncontract dealers. Far from having bypassed SEC procedures, as appellant claims (Jur. St. 27 n.31), the NASD letter actually relayed to NASD members *the SEC staff's view* that selling group agreements could and often did bar such transactions (see Gov't Ex. 6) and the staff's suggestion that, if they had not already done so, investment company underwriters might amend their selling group agreements to cover the point involved (see Gov't Ex. 16). The SEC staff's advice was fully consistent with that agency's continuing power under Section 22(f) to regulate transferability restrictions in registered uniform sales agreements. Moreover, the doctrine which permits private parties to join together to influence a government agency without risking antitrust liability (see *United Mine Workers* v. *Pennington,* 381 U.S. 657, 670 (1965)), surely authorizes their congressionally

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[55] See pages 11-12, *supra.*

sanctioned self-regulatory association to communicate to them the agency's response and to suggest an open and public course of action which will be fully subject to that agency's continuing scrutiny.[56]

As regards the alleged dissemination of misleading market information and suppression of market quotations by the NASD (¶¶ 17(d) & (e)), it is apparent from the foregoing discussion that the SEC has ample authority under the Maloney Act and the Investment Company Act, in addition to other statutes which it administers (e.g., Section 15(c)(2) of the 1934 Act, 15 U.S.C. § 78o(c)(2)), to deal with such practices and to conform them to the purposes of Sections 22 (d) and 22(f) of the Investment Company Act. Market information is exclusively regulated by the SEC, directly and through its control of NASD rules and bylaws.[57]

Clearly, the SEC's all-encompassing statutory and regulatory authority over the alleged practices makes this the "different case" hypothesized in *Silver* v. *New*

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[56] Unlike *Georgia* v. *Pennsylvania R.R.*, 325 U.S. 439 (1945), any changes in the sales agreement restrictions, whether or not the product of collective action, would be apparent to the SEC through public filings of the sales agreements and the amendments thereto. The market impact of such changes is fully within the control of the SEC. Under Section 22(f), for instance, the SEC has authority to disapprove any changes in the publicly filed sales agreements. Here the SEC staff actually suggested the possibility of further sales agreement restrictions.

[57] Article XVI of the NASD's bylaws governs member-dealers' computerized over-the-counter communications network (NASDAQ), and, as with all NASD bylaws, cannot be altered without SEC approval. Section 15A(b)(12) of the Exchange Act, as added in 1964, 15 U.S.C. § 78o-3(b)(12), requires the NASD to issue rules, subject to the usual vigorous SEC scrutiny, governing the form, content, manner of dissemination, and recipients of

York Stock Exchange, 373 U.S. 341 (1963).[58] In *Silver,* the SEC lacked regulatory authority over the challenged practices so as to displace the antitrust laws. Where that authority is present and is being fully exercised, however, antitrust immunity does arise. See *Gordon* v. *New York Stock Exchange,* Dkt. No. 74-1043 (2d Cir. June 28, 1974) aff'g, 366 F. Supp. 1261 (S.D.N.Y. 1973). *Gordon* held that the New York Stock Exchange's minimum rate structure was exempt from antitrust attack because of the long-standing congressional policy in favor of exchange self-regulation on matters of rates, subject to continuous SEC oversight. The instant case closely parallels *Gordon.* Whereas in *Gordon* it was said that "Congress made clear its judgment of the Commission's competence to assume the central role in assuring investor protection and exchange fair dealings," slip op. at 9, here the Maloney Act and the Investment Company

market quotations. See, *e.g.*, NASD Rules of Fair Practice, Art. III, §§ 5-6. Investors' information continues to be channeled through prospectuses and other sales literature, all of which must be filed with the SEC and must comply with SEC disclosure guidelines on topics such as "how to purchase," "pricing," "sales charge," and "repurchase, redemption, and market for shares." 1 F. Sec. L. Rep. ¶ 7178 at pp. 6299-15 through 6299-20; 3 *id.* ¶ 48,902.

[58] Indeed, *Silver* itself cites the fact of SEC scrutiny over NASD activities to illustrate the "different case." 373 U.S. at 358 n.12. See *Baum* v. *Investors Diversified Services, Inc.,* 286 F. Supp. 914, 924-26 (N.D. Ill. 1968), aff'd, 409 F.2d 872 (7th Cir. 1969); *cf. Gordon* v. *New York Stock Exchange, Inc.,* 366 F. Supp. 1261 (S.D.N.Y. 1973), *aff'd,* Dkt. No. 74-1043 (2d Cir. June 28, 1974); *Stark* v. *New York Stock Exchange, Inc.,* 347 F. Supp. 212 (S.D.N.Y. 1972), aff'd, 466 F.2d 743 (2d Cir. 1972); *Kaplan* v. *Lehman Bros.,* 250 F. Supp. 562, 566 (N.D. Ill. 1966), aff'd, 371 F.2d 409 (7th Cir. 1967), cert. denied, 389 U.S. 954 (1967).

Act clearly give the SEC the central role in assuring protection of mutual fund investors and fair dealings by the NASD.

Underlying the *Gordon* decision was the Second Circuit's recognition that exemption from the antitrust laws is necessary to avoid "the danger clearly contemplated by *Silver,* 373 U.S. at 358, that courts and the SEC would subject exchanges to repetitive or conflicting standards." Slip op. at 9. Balancing of all aspects of the public interest "becomes far too hazardous with two hands on the tiller," *id.* at 10, particularly when the matter is presently undergoing study and contemplated change. The analogy to the instant case is perfectly clear. The Antitrust Division is seeking to have the courts judicially force abandonment of a mutual fund distribution system sanctioned by Congress and actively regulated by the SEC and the NASD. Meanwhile, the SEC is completing a study of this system and will issue recommendations for change, if warranted.[59] The SEC should not have to labor under a cloud of *ad hoc* regulation by court orders based upon purported applications of the antitrust laws.

[59] See page 14, note 22, *supra.*

CONCLUSION

The questions raised by the appellant do not require this Court's plenary review. The judgment below should be summarily affirmed.

Respectfully submitted,

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